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May 22, 2019

**VIA ELECTRONIC MAIL
AND HAND DELIVERY**

Ruby Potter, Administrator
Maryland Health Care Commission
Center for Health Care Facilities
Planning & Development
4160 Patterson Avenue
Baltimore, MD 21215

Re: In the Matter of Johns Hopkins Bayview Medical Center
Docket No. 18-24-2430

Dear Ms. Potter:

Enclosed are six copies of Applicant's Response to Filing by United Workers,
Charm City Land Trust and Sanctuary Streets Dated May 6, 2019.

Thank you for your attention to this matter.

Sincerely,



Marta D. Harting

MDH:rlh
Enclosures

IN THE MATTER OF	*	BEFORE THE
JOHNS HOPKINS	*	MARYLAND
BAYVIEW MEDICAL CENTER	*	HEALTH CARE
Docket No. 18-24-2430	*	COMMISSION

* * * * *

**APPLICANT’S RESPONSE TO FILING BY
UNITED WORKERS, CHARM CITY LAND TRUST AND SANCTUARY STREETS
DATED MAY 6, 2019**

The Applicant, Johns Hopkins Bayview Medical Center (“JHBMC”), responds to the filing by United Workers, Charm City Land Trust and Sanctuary Streets (collectively, the “Commenters”) dated May 6, 2019 and served on JHBMC on May 7, 2019. JHBMC filed a Motion to Strike this filing on May 17, 2019 on grounds that it is contrary to COMAR 10.24.01.08F. If the Commission does not strike the filing, JHBMC responds to the filing as set forth below.

1. A Motion Was Not Required or Appropriate Under COMAR 10.24.01.10(B)

The Commenters press their curious argument that JHBMC is required to file a motion to “exclude” them from this review under COMAR 10.24.01.10(B). As explained in JHBMC’s prior response, the Commenters are not interested parties unless the Reviewer determines that they have demonstrated that they are “adversely affected” (i.e., could suffer a potentially detrimental impact from the approval of the project in an issue area over which the Commission has jurisdiction) “such that the Reviewer determines, in the reviewer’s sole discretion, that the [Commenters] should be qualified as an interested party to the certificate of need review.” COMAR 10.24.01.01B(2)(emphasis supplied).

Accordingly, there would be no basis for the Applicant to file a motion to “exclude” the Commenters from this review before the Reviewer determines them to be qualified to be interested parties in the first place.

In their May 6 filing, the Commenters ignore the definition of “adversely affected” and the fact that they are not interested parties unless they are recognized as such by the Reviewer, and simply rehash their misguided argument that JHBMC was required to file a motion to “exclude” them from this review. It is the Commenters (not JHBMC) who seek action by the Reviewer -- their recognition as interested parties -- without which they are not interested parties to this review. Indeed, as interpreted by the Commenters, it was the Commenters who were required to file a motion under COMAR 10.24.01.10B to be recognized as interested parties, since without that action, they cannot participate in this review. Their interpretation is unfounded under the regulations, and unsupported by Commission practice under which a person seeking to be recognized as an interested party is asserts the grounds for granting interested party status in the person’s comments, to which the applicant responds in its response to the comments.

2. Interested Party Standing (COMAR 10.24.01.01B(2), (20))

The Commenters do not meet the Commission’s narrow definition of “adversely affected” in COMAR 10.24.01.01B(2)(d). This is true on the face of the Commission’s regulations, without turning to common law standing principles for guidance, as explained in detail in JHBMC’s prior responses to the Commenters’ filings. The plain language of the Commission’s regulations require the alleged adverse impact to: (1) be in an issue area over which the Commission has jurisdiction, and (2) result from the approval of the project being reviewed by the Commission. Here, the adverse impact claimed by the

Commenters (affordable housing) is not an issue area over which the Commission has jurisdiction, and the Comments do not claim any respect in which the approval of this Project (which involves no construction) would result in an adverse impact on affordable housing in any event. Further, there would have been no reason for the Commission to have painstakingly enumerated the other categories of “adversely affected” persons in .01B(2)(a)-(c) if persons making vague, generalized claims of impact (such as those made by the Commenters) are allowed to be interested parties under .01B(2)(d).¹

The Commenters continue to rely on a lenient standard for administrative standing under Sugarloaf Citizens’ Assoc. v. Department of the Environment, 344 Md. 271 (1995), but that case makes clear that this leniency only applies absent a statute or regulation specifying a “more restrictive standard.” 344 Md. at 286. Here, the Commission’s regulations narrowly define who may be an interested party in a CON review, making the lenient standard discussed in the Sugarloaf case inapplicable.

The Commenters argue that interpreting “adversely affected” consistent with common law standing principles for purposes of being an interested party in a CON review conflates that term (and renders it superfluous) with “aggrieved party” who is entitled to seek judicial review of the Commission’s decision on a CON. As set forth above in prior JHBMC filings, however, the Commenters do not qualify to be interested parties

¹ Further, as explained in JHBMC’s responses to the Commenters’ prior filings, their claim that they (or the people they claim to represent) pay for health insurance is not a ground upon which they qualify to be interested parties. Third party payors are a categorical form of interested party under COMAR 10.24.01.01B(20)(c). If the definition of “adversely affected” under .01B(2)(d) was broad enough to encompass an employer (or individual) paying premiums to a third party payor, it would certainly have been broad enough to encompass the third party payor itself, so there would have been no reason to make third party payors a categorical form of interested party. Nor would this claim give rise to interested party status because this project involves no rate impact.

under the plain language of the Commission's regulations without resort to common law standing principles.

"Aggrieved party" (for purposes of standing to seek judicial review) would not be rendered superfluous by interpreting "adversely affected" consistent with common law standing principles in any event. "Aggrieved party" is defined to mean an interested party who is "adversely affected" by the project and who filed comments on the application in accordance with the Commission's regulations. The definition of "interested party" in COMAR 10.24.01.01B(20) includes several categorical forms of interested parties (such as third party payors and local health departments) in addition to the category of persons that meet the definition of "adversely affected" in COMAR 10.24.01.01B(2). A person who participates in a CON review as a categorical form of interested party and files comments as such would not be entitled to seek judicial review as an "aggrieved party" unless the person demonstrates that the person would be "adversely affected" by the project. Accordingly, the definition of "aggrieved party" continues to have meaning and effect in limiting the categories of interested parties who can seek judicial review to just those who can demonstrate they are "adversely affected."²

The Commenters suggest that granting them interested party status would be consistent with the CON Modernization Task Force Final Report, which refers to an underdeveloped capability in the standard CON project review process for public hearings or formalized structures for public input. See Task Force Final Report, at 12; Interim

² The definition of "adversely affected" in .01B(2) states that it is for purposes of determining interested party status in a CON review. Accordingly, the term "adversely affected" within the definition of "aggrieved party" is not limited to the persons described in the definition of "adversely affected", which ensures that the other categorical forms of "interested party" under .01B(20) are not precluded from seeking judicial review if they can demonstrate that they would be "adversely affected" under common law standing principles. This is consistent with interpreting "adversely affected" under .01B(2)(d) for purposes of interested party status in light of common law standing principles.

Report, at 13-14. The recognition that the standard CON process under current law lacks a formalized structure for public hearings is irrelevant to whether the Commenters have met the narrow definition of “adversely affected” in order to be recognized as interested parties under the Commission’s regulations. Further, as discussed in JHBMC’s prior responses, granting interested party status to the Commenters would open the door to a wide array of advocacy organizations to be interested parties, contrary to the Commission’s goal of streamlining the CON review process.

The Commenters argue that they meet the definition of “adversely affected” because their comments are probative of COMAR 10.24.01.08G(3)(d) (Viability of the Proposal), specifically, to the availability of community support for the project. This argument misses the mark. The definition of “adversely impacted” does not depend on whether the person comments on an issue area within the Commission’s jurisdiction; it depends on whether the detrimental impact the person claims is in an issue area over which the Commission has jurisdiction.³ The Commenters have not demonstrated any detrimental impact that it would suffer from the approval of the project in an issue area over which the Commission has jurisdiction.

Further, the Viability criterion requires the Commission to consider “the availability of financial and nonfinancial resources, including community support, necessary to implement the project within the time frames...”, and requires the applicant to “describe and document the relevant community support for the proposed project.” (Emphasis

³ Viability is not one of the State Health Plan standards that the Commenters argued has not been satisfied by JHBMC in comments filed within 30 days of the docketing of the Application, so any claim under this standard is untimely in any event. Under COMAR 10.24.010.08F(1)(a), all grounds upon which the Commenters assert the Application does not meet the applicable standards were required to have been asserted in comments filed within 30 days after docketing of the Application.

supplied). Having (or lacking) the Commenters' support is unnecessary and irrelevant to JHBMC's ability to implement this project within the required time frames.

3. Failure to Comply with COMAR 10.24.01.08F(1)(d)

The Commenters blame their failure to provide any documentation or sworn affidavits with their February 14, 2019 Comments on the lack of a definition of "appropriate documentation" in the regulation and the "precise requirements" for a sworn affidavit. They suggest that they should be allowed to provide this support in the "evidentiary hearing stage" of this review.⁴ The requirement in COMAR 10.24.01.08F(1)(d) to appropriately document and support with sworn affidavits factual claims outside the record is clear and unqualified, and is unrelated to the regulation allowing an evidentiary hearing to be held in the extraordinary circumstances set forth in COMAR 10.24.01.10D(4).

The Commenters seek to have their failure to support their factual assertions in support of interested party standing excused, suggesting that these assertions were "true on their face" and "commonly known," analogizing to a court's ability to take judicial notice of facts under certain circumstances. There is no exception to the requirement in COMAR 10.24.01.08F(1)(d) to provide a sworn affidavit and/or appropriate documentation for factual assertions because the filer proclaims them to be "true on their face and commonly known." The Commenters' analogy to judicial notice principles fails because it is settled that facts of which a court "cannot take judicial notice are facts about the parties and their

⁴ They do not suggest how "sworn affidavit" is ambiguous. Nor do they explain how their lack of understanding of what is "appropriate documentation" is grounds for their failure to provide any documentation of their factual assertions with their comments.

activities, businesses and properties...” Trial Handbook for Maryland Lawyers §20.1 (3d ed.); Abrishamian v. Washington Medical Group, 216 Md. App. 386, 414 (2014). All of the factual assertions by the Commenters in support of their standing to be interested parties are about the Commenters themselves and their members. Accordingly, these are not facts of which judicial notice could be taken under Maryland law. Nor is there anything “true on its face” or “commonly known” about the Commenters’ vague factual assertions about their organizations in support of interested party standing in the Comments, or their claim to “represent people” within JHBMC’s service area who purchase health insurance and who may be qualified to receive financial assistance.

The Commenters suggest that they have provided the required support for their factual assertions regarding medical debt collection practices with their March 25, 2019 filing. As explained in detail in JHBMC’s April 11, 2019 filing, in addition to being untimely, the affidavit and documentation filed by the Commenters is incomplete and inadequate under COMAR 10.24.01.08F(1)(d). Accordingly, even if this information had been timely filed, the Comments would still fail to comply with .08F(1)(d).

4. Charity Care Standard (COMAR 10.24.10.04A(2))

The Charity Care Standard provides as follows (emphasis supplied):

Each hospital shall have a written policy for the provision of charity care for indigent patients to ensure access to services regardless of an individual’s ability to pay. (a) The policy shall provide ... (ii)... Individual notice regarding the hospital’s charity care policy shall be provided at the time of preadmission or admission to each person who seeks services in the hospital.

The Charity Care Standard requires a written policy with the required provisions contained in it. There is no dispute that JHBMC has a written charity care policy. JHBMC’s charity care policy (App. Ex. 7, at 1) requires that information about the availability of charity care

be provided before discharge, which is consistent with providing the notice at the time of admission. The Commenters claim that the policy does not comply with the requirement in the Standard to state that individual notice of the charity care policy be provided at the time of admission. As JHBMC has explained in its prior responses, if the Reviewer determines that JHBMC's policy does not contain the required language to comply with the Charity Care Standard, there is ample precedent for requiring an applicant to revise its charity care policy as a condition to CON approval.

The Commenters also claim that the charity care policy does not comply with the standard because of its U.S. citizenship requirement.⁵ As explained in JHBMC's April 11, 2019 Response, the Commission has approved CON applications with charity care policies containing this provision on multiple occasions in the past, which are cited in JHBMC's response. The Commenters cite no contrary precedent and make no meaningful response to the overwhelming precedent cited by JHBMC, simply arguing that the Commission should disregard its precedent. This provision does not violate the Charity Care Standard and there is no basis for the Commission to depart from precedent in this review.

The Commenters argue that the Commission should hold an evidentiary hearing on whether JHBMC is providing notice of charity care at the time of admission, summarizing statements it claims to have received from three patients (two of whom it states were taken from patients of The Johns Hopkins Hospital, not JHBMC) that they were not informed of JHBMC's charity care policy in connection with their admission

⁵ The Commenters first raised this claim in its March 25, 2019 filing. Because it was not raised in comments filed within 30 days after the Application was docketed, this claim is untimely and should not be considered.

several years ago. There is no basis to hold an evidentiary hearing on this issue. As discussed above, the only issue under the Charity Care Standard is whether JHBMC's charity care policy provides that individual notice regarding JHBMC's charity care policy be provided at the time of preadmission or admission. An evidentiary hearing is not required or appropriate to determine whether JHBMC's charity care policy contains the required provision.

In each of the prior CON reviews cited by JHBMC in its April 11, 2019 filing (attached as Exhibits 1 - 5 to that filing), the applicant's charity care policy did not state that individual notice is given prior to admission, yet the Commission found those applications to be consistent with the State Health Plan standard. Further, as explained by JHBMC in its prior responses in this review, JHBMC interprets its charity care policy to require individual notice to patients regarding the availability of charity care at the time of admission, such that it provides notice at the time of admission in the Patient Handbook (as well as placing notice regarding the availability of charity care on every patient bill).⁶ See Exhibits 6 and 7 to JHBMC's Response to Comments filed March 11, 2019.

The Commenters' attempt to dispute whether JHBMC provides notice of charity care to patients does not give rise to a dispute of material fact for an evidentiary hearing, let alone demonstrate the extraordinary circumstances for an evidentiary hearing under COMAR 10.24.01.10D(4).⁷ The Reviewer can review JHBMC's charity care policy to

⁶ As explained in JHBMC's Response filed on April 11, 2019, the HSCRC conducts an annual audit of each hospital's compliance with its financial assistance and medical debt collection policies. JHBMC's most recent audit (June 30, 2018) found only two cases in which the policy was not followed, and those two cases involved instances where patients were approved for financial assistance but should have been denied. See Exhibit 8 to JHBMC's April 11, 2019 Response, at 15.

⁷ The Commenters did not attach any "statements" to or provide sworn affidavits with their May 6, 2019 filing. Further, in addition to failing to generate a material dispute of fact, the Commenters' May 6, 2019

determine if it contains the required provisions under the Charity Care Standard, and if s/he decides it does not, can require JHBMC to revise its policy as a condition to CON approval.

CONCLUSION

For the reasons stated above and in JHBMC's March 11 and April 11, 2019 Responses in this matter: (1) the Comments and subsequent filings by the Commenters fail to comply with COMAR 10.24.01.08F(1)(d), and (2) the Commenters should be denied interested party status. Additionally, the Commenters have failed to identify any respect in which JHBMC's Application does not meet the applicable State Health Plan standards so they have not provided any basis to deny a CON in this matter.

Respectfully submitted,



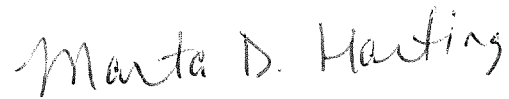
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Counsel for Johns Hopkins Bayview
Medical Center

filing well past 30 days after docketing of the Application represents an untimely attempt to generate an issue of material fact for an evidentiary hearing.

CERTIFICATE OF SERVICE

I certify that on this 22nd day of May, 2019, a copy of the foregoing Response was emailed and mailed, first class, postage prepaid, to:

Peter Sabonis
Chelsea Gleason
2424 McElderry Street
Baltimore, MD 21205
Peter@nesri.org
Chelsea.gleason@gmail.com

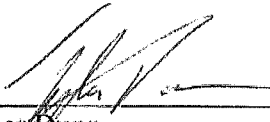


Marta D. Harting

AFFIRMATIONS

AFFIRMATION

I hereby declare and affirm under the penalties of perjury that the facts stated in the foregoing Response to Comments and Attachments are true and correct to the best of my knowledge, information, and belief.



Tyler Dunn
Administrative Resident

5-16-2019

Date

AFFIRMATION

I hereby declare and affirm under the penalties of perjury that the facts stated in the foregoing Response to Comments and Attachments are true and correct to the best of my knowledge, information, and belief.

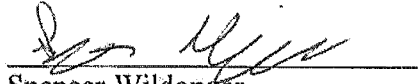


Anne Langley
Senior Director
Health Planning and Community Engagement
Johns Hopkins Health System

10 May 2019
Date

AFFIRMATION

I hereby declare and affirm under the penalties of perjury that the facts stated in the foregoing Response to Comments and Attachments are true and correct to the best of my knowledge, information, and belief.



Spencer Wildonger
Director of Health Planning
Health Care Transformation & Strategic Planning
Johns Hopkins Health System

5/16/2017
Date